IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 629

EDWARD M. BRYAN, ET AL.,

Petitioners,

vs.

A. A. CREAVES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRANCIS HEISLER,
LEON M. DESPRES,
STANLEY F. EVANS,
J. J. GORDON,
77 W. Washington St.,
Chicago, 2 Illinois,
Counsel for Petitioners.

FRANCIS HEISLER,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 330 WEST JACKSON, CHICAGO

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STATUTES, TEXTS AND MISCELLANEOUS.

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Edward M. Bryan, T. H. Olson, H. L. Fisher, R. F. Lundeen, John DeLeys, W. E. Jones, Herman L. Seelye and H. W. Overbey, petitioners, pray that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, which judgment affirmed the order of the United States District Court for the Northern District of Illinois, Eastern Division, which order,—without an opinion,—dismissed this cause.

Opinions Below.

The opinion of the Circuit Court of Appeals is set out in the record (Tr. 246-249), and is reported in 138 F. (2d) 377. The order of the District Court, without findings of fact, without conclusions of law, and without an opinion, is set out in the record (204 and 205).

Jurisdiction.

The opinion of the Circuit Court of Appeals was filed on the 28th day of October, 1943 (Tr. 245).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, March 25, 1940, October 21, 1940 and May 26, 1941.

Questions Presented.

1. Did the Circuit Court of Appeals, by erroneously interpreting the laws of the State of Illinois, establish a new State law contrary to the well-established rule that such judicial legislation is improper?

2. Did the Circuit Court of Appeals, in disregarding the law of the State of Indiana,—the State where the contract was entered into,—thereby reverse the rule of law that the interpretation of a contract is governed by the *lex loci contractus?* (b) If there be a conflict of law between the State *loci contractus* and the State where a defendant,—not a party to the contract,—is sued, will the Circuit Court of Appeals, by disregarding the *lex loci contractus*, dissolve, or rather, create a conflict of law?

3. When an equity suit in the Federal Court of Indiana is terminated against certain defendants (trustees), pursuant to a covenant not to sue, reserving the right to proceed in Illinois against a third party (co-trustee), is the Circuit Court of Appeals authorized (a) in holding under the Illinois law that the covenant not to sue is a release of the Illinois defendant as a joint tort-feasor, (b) disregarding the Indiana law as to a qualified release which does not release anyone but the person so released, (c) ruling,—contrary to the expressed wording of the covenant not to sue that the parties intend to reserve their right of action

against the third party,—that such reservation of right notwithstanding, the third party is released?

4. Is the Circuit Court of Appeals authorized (a) to disregard the fact that the defendant here was sued on an express trust, (b) that suit was brought in equity for accounting for an unliquidated claim, and (c) that rules of law, even if properly interpreted, are not to apply to an equity suit against a trustee.

STATEMENT.

Nature of Proceedings.

The proceedings here involve an order of the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter referred to as the Illinois District Court) dismissing Petitioners' amended complaint filed against the defendant (Tr. 204, 205), and the subsequent judgment of the Circuit Court of Appeals for the Seventh Circuit affirming the order of dismissal (Tr. 250).

The Facts.

Petitioners filed their original complaint against the present defendant and against Damon and Edith Smith, the Oxford Institute and the National Funding Corporation in the Illinois District Court, charging the individual defendants with fraud, deceit and acts of omission as trustees acting on behalf of the Petitioners, and prayed that the Court order the defendants to account for the moneys found to be due to Petitioners (Tr. 2-48 and 49). Damon and Edith Smith claimed residence in Indiana and thus lack of jurisdiction in the Illinois District Court, and obtained their dismissal from the suit (Tr. 38, 40). Petitioners then filed their suit against Damon and Edith Smith in the District Court of the United States, Southern District of Indiana, Indianapolis Division (hereinafter referred to as the Indiana District Court) (Tr. 166-185), where, after extended hearings, the court ordered the two defendants to account as recommended by the Master (Tr. 70 to 144). The accounting was proceeded with to determine the profits obtained and expenses incurred by defend-

ants in operating certain farms found to have been purchased with moneys deposited on behalf of the Petitioners in a certain trust account. During the accounting a settlement was offered by defendants along the lines of a memorandum agreement dated April 16, 1942 (Tr. 185-192), which stated, among others, that:

> "The parties are desirous of composing and compromising their differences without further litigation. * * * A stipulation shall be entered into before the Special Master disposing of said action according to the terms of this memorandum * * * (The defendants) shall convey to the first parties (Petitioners) * * * their interest in real estate * * * as to suits now pending in the United States District Court in Chicago between certain of the first parties (Petitioners) as plaintiffs and A. A. Creaves, Oxford Institute and National Funding Corporation, as defendants, it is agreed that no judgment shall be taken against either the Oxford Institute or the National Funding Corporation * * * with the right to continue such actions to judgments against A. A. Creaves shall remain unimpaired and this agreement shall constitute no release of any liability of said A. A. Creaves. * * * It is further agreed that the claims asserted by the first parties (Petitioners) against the third parties (defendants) exceed the value of the land which is to be conveyed by the third parties. * * *" (Tr. 185-191.)

Subsequently, the lands referred to in the memorandum agreement were conveyed by the Indiana defendants to Petitioners, who simultaneously gave them their "Indenture of Agreement and Covenant Not to Sue" on April 29, 1942 (Tr. 195-198). The covenant, referred to the memorandum agreement of April 16, 1942, as a "Stipulation and Agreement" which

> "* * * contemplated the exchange of mutual covenants not to sue the parties thereto and the exchange of such assurances that the controversy between the parties had been fully terminated", (Tr. 195).

After referring to the dismissal of the suit in the Indiana District Court and the dismissal of the Indiana defendants from the suits in the Illinois District Courts, the covenant further states that the Petitioners,

> "* * * separately and severally covenant and agree with the parties of the second part (Indiana defendants) separately and severally that they will not individually, separately or jointly institute or prosecute or cause to be instituted or prosecuted any proceeding. * * * The foregoing covenants not to sue and the acceptance of such mutual covenants not to sue by the parties hereto shall not be and is not to be taken to be a discharge or satisfaction of the whole or any part of the liability of the parties hereto, and shall not in any wise affect any claim which any party hereto has or may have against any person or corporation growing out of the operation of the Oxford Institute contingent bonus fund; and particularly any claim which any or all of the undersigned my have in respect thereof as againt Albert A. Creaves, * * *" (Tr. 195, 197).

The original suit filed in the Illinois District Court was on behalf of two of the Petitioners. An additional suit was filed by the remaining Petitioners against the same defendants (Tr. 49, 50). Both of these Illinois cases were from time to time continued while proceedings were had before the Indiana District Court on behalf of all of the Petitioners. After the execution of the covenant not to sue, A. A. Creaves remained the sole defendant in the two suits filed in the Illinois District Court, which suits were consolidated (Tr. 53) and then the amended complaint (Tr. 56-70), was filed on June 23, 1942, which amended complaint was dismissed by the order of the Illinois District Court, from which order an appeal was taken to the Circuit Court of Appeals for the Seventh Circuit.

The amended complaint alleged that the Petitioners were employees of Oxford Institute of which the officers and the majority stockholders were Damon and Edith Smith (de-

fendants in the Indianapolis suit), and of which defendant Creaves was a stockholder and secretary-treasurer in charge of the office (Tr. 22-29; 32-36 and 58); that Petitioners were induced to agree to invest part of their earnings in the "Trustees' Oxford Institute Fund", the trustees of which,—among them the Indiana defendants and defendant Creaves,—were to invest the money in Government bonds and other good securities (Tr. 29-31 and 59). Said fund was managed exclusively by the Indiana defendants and by defendant Creaves, who refused to give any information to the Petitioners concerning the status of said fund during its existence from 1929 to 1939 (Tr. 59-60).

The amended complaint further alleged that defendant Creaves, in conspiracy with the Indiana defendants, purchased defaulted stocks at less than face value and sold such depreciated stocks to the trust at full face value; that he invested moneys belonging to the trust in real estate and in oil stocks and leases; that he withdraw some $20,000 cash from the trust and turned it over to the defendants in the Indiana suit for their own purposes (Tr. 60-61); that prior to the termination date of the trust agreement defendant Creaves by artifice, fraud, threats and intimidation caused the Petitioners to release their interest in said trust and to exchange such interest for shares in the National Funding Corporation, which corporation was organized and officered by the Indiana defendants and by defendant Creaves; that the latter falsely kept the books of said corporation; withheld checks with intent to defraud Petitioners; withheld funds belonging to them for his own benefit and for the benefit of the Indiana defendants; wrongfully commingled funds belonging to the trust with those belonging to Oxford, and wrongfully used for his own purposes the money so commingled; failed to keep records and kept false and forged records; converted moneys,—belonging to the Petitoners and to be deposited

in said trust,—for his own use and for the use of the defendants in the Indiana suit (Tr. 60-61).

The above allegations were substantially the same as the allegations in the original suits in Illinois and in the Indiana law suit. There were, however, additional allegations in the amended complaint which were based on the testimony of the defendants in the Indiana suit. So it was alleged against the defendant Creaves that he converted Government bonds deposited with the trust and belonging to the Petitioners in the amount of $31,880.08 and transferred the proceeds to the personal use of himself and the defendants in the Indiana suit; that he transfered $15,358.00 belonging to the Petitioners and deposited said sum to the personal account of the Indiana defendants who used the same to purchase a certain farm and that other moneys,—belonging to the Petitioners and on deposit in the trust,—were transferred by defendant Creaves to the Indiana defendants to purchase additional lands in Illinois (Tr. 62-94, 95-99); that after the purchase of said lands the defendants to the Indiana suit managed and controlled them for their own use and for the use of defendant Creaves; that out of the Illinois land, or rather from the oil leases thereon, the defendants in the Indiana suit received $84,000.00, of which 20%, or $16,800.00 was wrongfully turned over to defendant Creaves; and that further sums were received from the oil leases by the Indiana defendants amounting to $41,192.02, of which the defendant Creaves received wrongfully a 20% cut amounting to $8,022.58. The further sum of approximately$50,000.00 was received by the Indiana defendants, from which defendant Creaves again received a 20% cut, or the sum of $9,241.94, which moneys rightfully belonged to the Petitioners (Tr. 65 and 66). Petitioners prayed for an accounting by defendant Creaves and for other relief (Tr. 62-70).

Defendant Creaves filed on September 1, 1942, his an-

swer and claimed that the cause of action is the same as that sued upon by the Petitioners in the Indiana suit, and that the defendant's liability, if any, is included in or joined with the liability of the defendants in the Indiana suit; that Petitioners have executed an agreement with the defendants in the Indiana suit releasing them from all liability to the Petitioners, and pleaded such release as a bar to the action on the amended complaint (Tr. 147). Defendant Creaves further claimed as his defense that Petitioners were estopped from making a claim against him for the converted trust funds because Petitioners elected in the Indiana suit to claim the land into which the converted trust funds were invested (Tr. 148). Defendant Creaves,—as a third defense,—denied some of the allegations of the amended complaint (Tr. 150) but admitted the sale of the Government bonds belonging to the Petitioners; admitted the deposit of the proceeds with the Oxford Institute. though denied the conversion by him (Tr. 150). He also admitted the transfer of $15,350.00 in trust money from the trust account to the account of the Indiana defendants and the use of that money for the purpose of purchasing certain lands; admitted that the land so purchased belongs to the Petitioners; admitted the purchase of additional lands, but denied conversion by himself. He admitted that the Illinois land and oil properties,—purchased with Petitioners' money,—were managed and controlled by the defendants in the Indiana suit; admitted that he received the sum of $16,800.00 from the defendants in the Indiana suit, which moneys came from the lease money obtained by them on the Illinois land, but he denied that he received additional sums from the Indiana defendants and denied that the money belongs to Petitioners (Tr. 151).

Petitioners filed their reply (Tr. 150-157), in which they set forth that while the cause of action in the amended complaint arises from the same transaction complained of

in the original Illinois suits and in the Indiana suit, but that there are other acts and charges against defendant Creaves not previously charged against the defendants in the other suits; that the agreement of April 16, 1942, did not release defendant Creaves because said agreement was merely a preliminary memorandum, executory in character, and that it expressly provided that the right of action against defendant Creaves should remain unimpaired. The reply further stated that said agreement released no one and particularly did not release defendant Creaves, and that it provided that the claim asserted by the Petitioners against the defendants in the Indiana suit exceeds the value of the land which was conveyed to Petitioners, and represents a part satisfaction only (Tr. 154); that the amended complaint had attached to it the report of the Special Master in the Indiana suit which report was stricken by the Court on Defendant Creaves' Motion on the ground that, "this defendant was not a party to said proceedings" (Tr. 155); that defendant Creaves acted as trustee for Petitioners and, having been guilty of fraud, he cannot profit from his illegal and fraudulent acts done as a fiduciary (Tr. 155). Petitioners filed their Motion to strike defendant Creaves' defenses, and on September 18, 1942, this motion was overruled by the Court (Tr. 158. The Court then ordered that the parties submit briefs in support of their respective positions concerning the defense of release claimed by defendant Creaves (Tr. 159).

About a month later, on October 16, 1942, defendant filed a stipulation of the parties that defendant Creaves have leave to file instanter *nunc pro tunc* as of the date of his answer, *i. e.*, September 1, 1942, his Motion for Summary Judgment; that the hearing held on September 18th be deemed to have been held on said motion; that in connection with such hearing there be deemed to have been

submitted to the Court the matters of record and that the briefs to be filed on October 16th be deemed to be briefs in support and in opposition to said Motion for Summary Judgment. An order was entered accordingly (Tr. 160, 161). Defendant Creaves' Motion for Summary Judgment is substantially a repetition of his defense as to the release,—in the Indiana suit,—as a bar to this action, and, in the alternative, that if the agreement of April 16, 1942, be held not to be a release, it is still a bar to this action as a complete composition and settlement of the claim sued upon (Tr. 162). The stipulation of October 16, 1942, sets forth that the transfers required by the agreement of April 16, 1942, in the Indiana suit were made, except that Petitioners claim non-compliance in certain matters (Tr. 165); that on April 29, 1942, when the Indiana defendant executed their deeds and made the transfer to the Petitioners, they in turn executed a certain "Indenture of Agreement and Covenant Not to Sue," stated to be in effectuation of the agreement dated April 16, 1942.

On the 30th day of October, 1942, defendant Creaves filed his motion that he will

> "* * *move the Court to strike the 'Affidavit in opposition to defendants' Motion for Summary Judgment' filed herein (by Petitioners) on October 22; 1942" (Tr. 201, 202).

on the ground that it does not comply with Rule 56. An order was entered on said date that,

> "An affidavit in opposition to defendants' motion for Summary Judgment be and it is hereby stricken from the record herein." (Tr. 202, 203.)

On the same day Petitioners filed their Motion for leave to be given to one of them to file his "Affidavit in Opposition to the defendants' Motion for Summary Judgment" and that said affidavit be filed *nunc pro tunc* as of the 22nd day of October, 1942, which motion was denied by the Court

on the same day (Tr. 202, 203), on which date the Court entered a further order that defendants' Motion for Summary Judgment be sustained and that the cause be dismissed at Petitioners' cost, from which order of the trial court Petitioners appealed (Tr. 204, 205). On the 7th day of November, 1942, Petitioners filed their motion that the orders of October 30, 1942 be vacated and that Petitioners be given leave to have their attorney withdraw his signature from the stipulation filed on October 16, 1942, providing that defendant Creaves has leave to file instanter *nunc pro tunc* as of September 1, 1942, his Motion for Summary Judgment and further that defendant Creaves' Motion for Summary Judgment filed on October 16, 1942, be stricken from the record.

As ground for said motion, Petitioners set forth that the stipulation of October 16, 1942, providing for the filing of a *nunc pro tunc* motion by defendant Creaves was signed by Petitioners' counsel upon the agreement that an "Affidavit in Opposition" to said Motion for Summary Judgment may be filed on behalf of Petitioners within ten days from October 16, 1942, and that no objection thereto would be raised by defendant Creaves; that in violation of that agreement attorney for defendant Creaves,—after be obtained the signature of Petitioners' attorney to said stipulation,—moved the court that Petitioners' "Affidavit in Opposition" to defendant's Motion for Summary Judgment be stricken. This motion filed on behalf of the Petitioners was denied on November 13th (Tr. 218-222, 226).

Notice of Appeal was filed by Petitioners (Tr. 228-229) together with their statements of points (Tr. 229-233), their appeal bond (Tr. 234-235) and designation of record on appeal (Tr. 235-238).

The Circuit Court of Appeals sustained the orders of the trial court in all respects (Tr. 250).

Specification of Errors To Be Urged.

The Circuit Court of Appeals, in affirming the judgment of the District Court, erred in that it:

1. misinterpreted the laws of the State of Illinois by ruling that defendant here is released. Such ruling is in disregard of the clearly expressed intent of the parties to two agreements in a Indiana law suit, providing that none of the parties thereto should be released from liability and particularly that as to the defendant here, the right of action shall be maintained. By such misinterpretation the court in effect established a new rule of law for the State of Illinois contrary to the decisions of the Supreme Court of the United States.

2. (a) utterly disregarded the fact that the agreements in question were entered into in Indiana and that in interpreting the agreements, the law of the State of Indiana should control, which law provides for no release of any other parties but those who are intended to be and were released by the wording of the agreement: (b) created a conflict of state laws. The agreements to be interpreted were entered into between the parties to a suit in Indiana, in the State of Indiana, and the performance by those parties was had partly in Indiana and partly in Illinois. Even if there were a conflict between the State laws of Indiana and Illinois, such a conflict is not dissolved by disregarding the State laws of Indiana;

3. holding that terminating an equity suit in the Indiana District Court pursuant to a preliminary memorandum of agreement followed by a document entitled "Covenant Not to Sue", given to defendants in that suit who, as trustees, were joint-tort feasors with the defendant in the Illinois suit, thereby, (a) the defendant, in the Illinois District Court, was released because of such agreements; and (b) that the Indiana law,—which even in case of a qualified

release provides that no one but the person released is affected by the document,—is not controlling; (c) considered certain portions of the Indiana agreements, disregarded other definitive statements therein, and contrary to the intention of the parties to said agreements, ruled the defendant in this case as released.

4. (a) The defendant here was sued as a trustee, but, nevertheless, the law of trustees was left out of consideration by the court and (b) the court below disregarded the fact that the suit here was filed in equity for an accounting of unliquidated claims, and that the rules of equity and the laws of trusteeship are to be considered as controlling; (c) the court failed to consider that whenever equity jurisdiction is invoked, the strict rules of law do not apply, but rather, justice and equity ought to govern.

Reasons for Granting the Writ.

In affirming the judgment of the District Court, which dismissed the suit against defendant here, the Circuit Court of Appeals, by misinterpreting the law of the State of Illinois concerning releases and covenants not to sue, in fact established a new law for the State of Illinois, which new law is contrary to the decisions of the State Courts. By arbitrarily disregarding the expressed intention of the parties to the documents to be interpreted, and giving a tortuous interpretation to, at best, doubtful wordings in the documents, the Court below reached the decision contrary to law and equity, as it will be shown in the argument here to follow.

The question presented involved the determination whether or not two documents, one entitled "Memorandum Agreement" and the other "Covenant Not to Sue", executed prior to the termination of a certain equity suit in Indiana, were or were not releases given to the party

defendants, and whether or not the same released a co-trustee,—not party to the Indiana suit,—who was sued in the Illinois District Court. Even in case the finding of the Court below were to be correct as to the Illinois law, in disregarding the law of Indiana, which law is clearly contrary to the court's finding, a conflict was in fact created with the decisions of other Circuit Court of Appeals.

The question of trusteeship; the question of equity jurisdiction, were clearly disregarded by the court below in applying a strict interpretation of rules of law and applying them erroneously to an equity case involving a trustee. By disregarding such factors, and affirming the order of dismissal, Petitioners were deprived of the due process of law.

I.

The Memorandum Agreement and the Covenant Not to Sue Given by Petitioners to Certain Defendants in the Indiana Suit Do Not Operate to Discharge the Defendant Here Because Those Documents Did Not Surrender Any Right But Simply Expressed an Agreement Not to Sue the Persons Involved, in Accordance With the Intention of the Parties, Which Also Reserved the Right of Action Against the Defendant Here.

The memorandum agreement of April 16, 1942 was put in writing while proceedings to account were going on in accordance with the order of the District Court of Indiana directed against the defendants, who were co-trustees with Creaves, defendant in Illinois (Tr. 185-192, 164). The accounting so begun was to determine the rents and profits that accrued, and expenses incurred by the Indiana defendants during the many years of operation and control of some 2,700 acres of farm land, including some 800 acres of oil land, upon the Master having found that trust funds

belonging to the Petitioners were invested in said lands (Tr. 164). During the course of the Indiana accounting hearings, Petitioners, as plaintiffs, and the defendants commenced negotiations for settlement of the litigation and on April 16, 1943, a tentative memorandum as a basis for a contemplated settlement was dictated by the Master to the court reporter. The memorandum was thereafter transcribed by the reporter, amended by the parties, and, as amended, executed on or before April 29, 1942 but dated as of April 16, 1942 (Tr. 164). The agreement is the first one of the documents in question on the basis of which the defendant here claims a release. The document is entitled "Agreement" and appears on pages 185-192 of the transcript. Pertinent parts of the agreement were quoted heretofore in this Petition under the heading "The Facts".

From April 16th to April 29, 1942, the parties to the Indiana suit carried on further negotiations and on the latter date the conveyances and transfers required by the agreement were made, except, as the Petitioners claim, certain portions of the agreement were not complied with on the part of the defendants (Tr. 165). On April 29, 1942, the defendants to the Indiana suit delivered their deeds and assignments to Petitioners, who in turn executed a document entitled "Indenture of Agreement and Covenant Not to Sue", which covenant (Tr. 195 to 198) was stated to be "in effectuation of the agreement dated April 16, 1942" (Tr. 165, 166). The pertinent portions of this covenant not to sue are cited by us under the heading "The Facts".

We submit that the decision of the Court below is unwarranted because, in accordance with the Illinois law, the documents in question did not release anyone and particularly did not release the defendant herein. Even if, wrongfully, one were to disregard the fact that the defendant here is sued in equity, even if, wrongfully, one were to disregard the further fact that the defendant is sued by a *cestui*

que trust for wrongdoing as trustee, the Illinois law will not conclude, as the court below did, that a covenant not to sue is a release of a joint tort feasor. The Illinois law, as it has been repeatedly decided, will distinguish between a release and a covenant not to sue, because the settled rule is that while a release of one joint tort feasor releases all, a covenant not to sue given to the joint tort feasor releases no one. The leading Illinois case on the subject is *City of Chicago* v. *Babcock,* 143 Ill. 358, wherein a joint tort feasor claimed that a written covenant not to sue amounted to an accord and satisfaction and claimed that such covenant was not only a bar to an action against the other tort feasor, but also, by operation of law, was a release. This contention was rejected by the Supreme Court in stating:

> "Where there are a number of tort feasors, the party injured may, at his election, sue one, or several, or all; and where suit is against one or some of the wrongdoers, but not against all, the person or persons sued have no right to complain. And so, also, where there is suit against several tort feasors, the dismissal of the suit against one does not bar the action against the others. (*Knapp* v. *Roche,* 94 N. Y. 329; *Sloan* v. *Herrick,* 49 Vt. 327; *Bloss* v. *Plymale,* 8 W. Va. 393.) A release to one of several joint tort feasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others. Here there is no claim of a technical release under seal. The pending suit against LeCardi was dismissed, and a written agreement was signed that no action should be begun against LeCardi by appellee. This, on its face, was simply an agreement or covenant not to sue. The legal effect of such a covenant is not the same as that of a release. A covenant not to sue a sole tort feasor is, to avoid circuity of action, considered in law a discharge, and a bar to an action against such tort feasor. But the rule is otherwise where there are two or more tort feasors, and the covenant is with one of them not to sue him. In such case the covenant does

not operate as a release of either the covenantee or the other tort feasors, but the former must resort to his suit for breach of the covenant, and the latter can not invoke the covenant as a bar to the action against them."

In the case of *West Chicago St. R. R. Co.* v. *Piper*, 165 Ill. 325, the plaintiff received payment from one of the joint tort-feasors and executed a written document which could not be produced on the trial, and the other joint tort-feasor claimed the acceptance of such payment and the execution of a certain document as a release. The Supreme Court of Illinois disagreed with this contention, and, to the contrary, it concluded that a transaction whereby one joint tort-feasor paid the plaintiff money and the plaintiff thereupon dismissed the suit as to that defendant, had no tendency to prove a release or accord and satisfaction. Therefore the court ruled that acceptance of payment from one joint tort-feasor raises no presumption that it is in satisfaction of plaintiff's demand.

In the case of *C. & A. Ry. Co.* v. *Averill*, 224 Ill. 516, the plaintiff settled with one of the joint tort-feasors for a consideration and dismissed her suit against it. The other joint tort-feasor filed special pleas alleging that the settlement was in bar of the action because, as it was contended, the instrument given to the first tort-feasor was a release. The court, having examined the instrument, stated on page 522:

"It provides that it is expressly agreed and understood that the contract shall not be held or construed to be a release of any damages or right of action arising to appellee by reason of any matters at that date existing. The legal effect of a covenant not to sue is not the same as that of a release. * * * the covenant does not operate as a release of either the covenantee or the other tort feasor, but the former must resort to his suit for breach of the coverant and the latter cannot invoke the covenant as a bar to an action

against him. (*City of Chicago* v. *Babcock*, 143 Ill. 358; *West Chicago Street Railroad Co.* v. *Piper*, 165 Ill. 325.) The covenant in question was not to sue, and therefore came clearly within the rule announced in the two cases above cited and did not operate as a release to appellant."

In line with this decision we point to the agreement of April 16th, executed by the Petitioners in the Indiana lawsuit, which in effect was nothing but an executory agreement laying down certain propositions which they intend to carry out because they "are desirous of composing and compromising their differences without further litigation". To do so, the parties contemplated that, "A stipulation shall be entered into before the Special Master disposing of said action according to the terms of this memorandum", and it contemplated certain payments by the defendants to the Petitioners, for which the plaintiffs "shall protect, by appropriate instrument" the defendants from further liability. This agreement, while contemplating payment to the plaintiffs, stipulates that even though such payments be made, "the claims asserted by the first parties (Petitioners) against the third parties, exceed the value of the land which is to be conveyed". The intention of the parties to that agreement is clearly expressed when it is stated that, "The parties agree not to sue each other * * * on any claims accruing up to this date involved in this cause or referred to herein", but it expressly provides that "the right to continue such actions to judgment *versus* A. A. Creaves shall remain unimpaired and this agreement shall constitute no release of any liability of said A. A. Creaves to any parties hereto." That said agreement was an executory one is definitely expressed in the last paragraph thereof, which states:

"* * * that the foregoing provisions are general in character and subject to execution of appropriate instruments, orders and decrees pertaining thereto as may be required" (Tr. 185-192).

We submit that the court below erred when it found that this agreement was a release of the defendant here. In fact, the parties expressly stated their intention to release no one, but rather to proceed with the execution of appropriate instruments for the purpose "not to sue each other", and that "proper instruments shall be executed to safeguard * * * accordingly" (Tr. 187, 188). The agreement was nothing more than a memorandum laying down certain stipulations on the basis of which the suit may be terminated, but only upon the execution of the appropriate instrument. The appropriate instruments were the transfers given by the defendants to the Indiana suit to Petitioners, and the execution of the "Indenture of Agreement and Covenant Not to Sue" by Petitioners (Tr. 195-198). Looking upon this covenant not to sue in line with the decision of the Supreme Court of Illinois in the *C. & A. Ry. Co.* v. *Averill* case, *supra*, we find that, just as in the Averill case, the parties to this covenant "expressly agreed and understood that the contract shall not be held or construed to be a release of any damages or right of action * * *." The covenant, in question here, states (Tr. 195), in referring to the agreement executed on April 16th, 1942, that a "* * * certain stipulation and agreement contemplated the exchange of mutual covenants not to sue the parties thereto * * *". The body of the document (Tr. 196-7) gives the wording of a usual covenant not to sue, and then expressly states that:

> "The foregoing covenants not to sue and the acceptance of such mutual covenants not to sue by the parties hereto shall not be and is not to be taken to be a discharge or satisfaction of the whole or any part of the liability of the parties hereto * * *" (Tr. 197).

The phrasing of this proviso clearly shows that the court below erred when it considered the covenant to be a release of the parties or of the subject matter of the litigation. It

is clear that the court erred when it further found that the self-same document released the defendant here when it provided that:

> "* * * and shall not in any wise affect any claim which any party hereto has or may have against any person or corporation growing out of the operation of the Oxford Institute Contingent Bonus Fund; and particularly any claim which any or all of the undersigned may have in respect thereof as against Albert A. Creaves" (Tr. 197),

and, further, that:

> "It is further understood and agreed that the mutual covenants and agreements * * * nothing contained herein shall affect in any manner the liability of said Albert A. Creaves as trustee of said Oxford Institute Bonus Fund" (Tr. 197).

The court below, on the basis of *Aiken* v. *Insull*, 122 F. (2d) 746 (CCA 7), concluded that the document here involved is a release, quoting the Insull case to the effect that:

> "We are satisfied that in substance (actual intent) as well as in form (language employed), the instrument constituted a release" (Tr. 248).

It appears that the court in construing a document looks to two indices, namely, the intent of the parties and the language used. We submit that both of these indices, if applied to this case, rule out a release because the intent of the parties is clearly expressed that they are contemplating, not a release, but rather the termination of the litigation and an agreement not to sue each other. This intent is expressed in unambiguous language, and, even under the decision of the Insull case, the court below erred when it affirmed the judgment of the trial court. The court below, however, erred further because its decision is contrary to the law of the State of Illinois. It is contrary to the decision in the case of *Vandalia R. R. Co.* v. *Nordhaus*, 161 Ill. App. 110. It is contrary to the decision in the case

of *Wallner* v. *Chicago Consolidated Trac. Co.*, 245 Ill. 148, in which case the Court decided that one of the main characteristics of the release is the extinguishing of the claim, which was not the intention of the parties in the instant case, who clearly stated that the covenant not to sue:

> "* * * shall not be and is not to be taken to be a discharge or satisfaction of all or any part of the liability of the parties hereto, and shall not in any wise affect any claim which any party hereto has or may have * * *" (Tr. 197).

Contrary to the decision of the court below, the *Wallner* case, *supra*, held that an accord and satisfaction extinguishes the cause of action. A covenant not to sue does not extinguish the cause, but is a mere agreement not to enforce it. As it was otherwise stated, "the right remains but the covenantor agrees not to exercise his right", as in this case Petitioners agreed not to exercise their rights against the defendants to the Indiana suit. This distinction was clearly summarized in the *Pacific States Lumber Company* v. *Bargar*, 10 F. (2d) 335, wherein, on page 337, it is stated:

> "Releases of, and covenants not to sue, a wrongdoer have from early times been considered distinct. A covenant not to sue one of several joint obligors or joint tort feasors did not at common law operate to discharge others from liability, since it was said not to have the effect, technically, of extinguishing any part of the cause of action. * * *
>
> "Indicia of a covenant not to sue may be said to be: No intention on the part of the injured person to give a discharge of the cause of action, or any part thereof, but merely to treat in respect of not suing thereon (and this seems to be the prime differentiating attribute); full compensation for his injuries not received, but only partial satisfaction; and a reservation of the right to sue the other wrongdoer."

The Circuit Court of Appeals erroneously disregarded this distinction when it affirmed the judgment of the trial

court and disregarded the distinction made by the Illinois law between a release and a covenant not to sue. There is a distinction as to their purpose, their nature, and their consequence; there is a difference in the legal effect produced by such documents. The court below disregarded the Illinois law which clearly states that a release is a relinquishment of a claim, while a covenant not to sue is merely an agreement not to enforce a claim. It erred when it found that the Indiana documents released the defendant here, even though those documents expressly excluded the relinquishment of the claim and simply provided for an agreement not to enforce a claim that is existing and the maintenance of which was expressly stipulated. A release, in accordance with the Illinois law, surrenders a right, which the Petitioners here did not do by the Indiana documents. They did waive their remedy, and thereby in accordance with the Illinois law the document remains a covenant not to sue.

In misinterpreting the law of Illinois as the court below did, it rendered a decision contrary to the established law of that State and contrary to the rule in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, wherein the Supreme Court of the United States stated on page 78:

> "* * * There is no federal, general law * * * Congress has no power to declare substantive rules of common law applicable in a state, whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the constitution purports to confer such a power upon the federal courts".

Because the erroneous decision of the Circuit Court of Appeals attempts to establish a new state law, we submit that the case should be brought here for review.

II.

Decision of the Court Here Is in Conflict With the Decisions of Other Circuit Courts of Appeals.

In applying the law of the State of Illinois,—*lex fori*,—to the interpretation of a contract that was made in the State of Indiana, the court here rendered a decision in conflict with other Circuit Courts of Appeals. As it appears from the record throughout, the two documents, namely, the agreement of April 16, 1942 and the covenants not to sue of April 29, 1942, both were entered into in the State of Indiana, terminating an equity suit maintained in a District Court in that state. Petitioners having dismissed their suit in Indiana, that state became at least in part the state of the performance. It is true that the instant suit was filed in the State of Illinois and thereby that state became similarly the forum, but the laws of the State of Illinois did not thereby become the *lex loci contractus*. The opinions of the courts are quite unanimous that:

> "Matters of validity which go to the very basis of the making of a contract involve primarily the law of the place where the contract was made. * * * The trend, however, if any, among the authorities and treatises, seems to be toward accepting the law of the place of making as governing the validity and constructions of a contract." 11 Am. Jurisprudence, p. 397. (Citing many cases.)

The same authority states further that:

> "The validity or invalidity so determined will generally be recognized wherever it is sought to be enforced even though the law of the forum would have determined otherwise if applied."
>
> 19 Am. Jurisprudence, p. 401 (citing many cases).

To the same effect spoke Beale in his *Conflicts of Law*, on pp. 1171 and 1174.

There is no doubt in cases where the place of the making of the contract is also the place where it is to be performed, since then the *lex loci contractus* and the *lex loci solutionis* are the same. There may be, however, some doubt when the making and performing of the contract are in different places. Under those circumstances the Supreme Court of the United States found the rules to be that:

> "(1) matters bearing on execution, interpretation, and validity are determined by the law of the place where the contract is made;
>
> "(2) matters connected with the performance are regulated by the law of the place where the contract, by its terms, is to be performed; and
>
> "(3) matters relating to procedure depend upon the law of the forum."
>
> *Scudder* v. *Union National Bank*, 91 U. S. 406, 23 L. Ed. 245.

This rule was observed by the various Circuit Courts of Appeals. In the instant case, however, the court below disregarded this rule and failed to look to the law of Indiana, where the contracts were made, but rather applied the law of Illinois, and as we respectfully submit, erroneously. Thus, by looking to the laws of the forum in preference to the *lex loci contractus*, the court brought its decision, as to the rule of law to be applied to the interpretation of contracts, into conflict with decisions with other Circuit Courts of Appeals.

Assuming, though not admitting, that the laws of the State of Illinois are as interpreted by the court below, even then we maintain that in accordance with the well-established rule hereinabove set forth, and applying the laws of the State of Indiana, the decision would have to be contrary to that handed down in this case. The Indiana courts consider on this subject the case of *Parry Mfg. Co.* v. *Crull*, 56 Ind. App. 77, 101 N. E. 756, as the leading case. In that

case the plaintiff, an employee of a railroad company, was injured. He executed a document stating that to avoid litigation between himself and the railroad company and to avoid the expenses of such litigation, and to

> "* * * forever set at rest the differences so existing between them, but in such way that such settlement shall not impair or affect the claim of said Crull against any person or corporation other than said railway company for negligently causing or helping to cause the said injury * * * the said Abner D. Crull, hereby covenants and agrees for himself * * * that neither he, they, nor any of them will ever sue or bring any action against said Indianapolis Union Railway Company, on account of injuries and damage to him occasioned by or growing out of the accident above described."

The court held the document to be a covenant not to sue and said:

> "The argument advanced and the cases cited in its support would have much force if it were true that the release of one joint tort-feasor would have the effect to release all, but such is not the rule. A distinction should be observed between releasing a claim and releasing one of the parties liable."

The court after reaffirming the well-known rule of law that a release of a claim releases of all continues:

> "* * * but he may release one of the parties so liable without releasing the others. The injured party may enforce his demand against all the joint wrongdoers except one and thus relieve that one of paying any part of his demand."

Further:

> "The authorities quoted state the rule in reference to a joint and several obligation arising out of contracts, but we can see no reason why the same rule should not apply to a like obligation arising out of a tort. In fact, there seems to be less objection in applying the rule in the latter class of cases than in the

> former, for the reason that no contribution is allowed as between joint tort feasors."

On the basis of the above opinion and on the authorities cited, the Court, with reference to the document executed, held that:

> "The contract between appellee and the railroad company cannot be construed as a release to that company of the claim which he was asserting against it. On the contrary, it is clearly manifest from the terms of the agreement that appellee did not intend to release his claim, but that he intended to retain it."

The court goes into the problem with reference to partial satisfaction, which we similarly claim in our case, and sets forth that:

> "However, where it is expressly agreed as in this case, that the amount paid is only a partial satisfaction, the other jointly or severally liable as tort-feasors are not relieved as to the residue of the damage, but the payment made will be regarded as a satisfaction *pro tanto*, as to the others. There is a decided conflict of authority upon this question, but we have reached the conclusion that the better reason as well as the weight of authority sustains the conclusion reached in this opinion." (Citing cases.)

Petitioners, in executing thet wo documents here in question, were not unmindful of the Illinois law and framed the documents so that they might be brought under the decision in the case of *C. & A. R. R. Co.* v. *Averill, supra.* Being led by the unanimous rule of law that in interpreting a contract the *lex loci contractus* govern, the documents followed closely the document mentioned in the case of *Parry Mfg. Co.* v. *Crull, supra,* under which decision neither the "Agreement" of April 16, 1942 nor the other, called "Covenant not to Sue" of April 29, 1942, can be considered a release of anyone, and particularly not a release of the defendant here.

For the reasons that the Circuit Court of Appeals here, in conflict with other Circuit Courts of Appeals, failed to look to the *lex loci contractus*, but looked exclusively to the *lex fori*, and because the decision of the court below is contrary to the laws of the State of Indiana, we respectfully submit that the case ought to be brought here for review.

III.

The Terminating of an Equity Suit in the Federal Court of Indiana Pursuant to Agreements Which in That State Are Not Considered Releases, Will Not Release the Defendant Here Contrary to the Ruling of the Court Below.

The court below, in its opinion (Tr. 246), puts the question before it thus:

> "Plaintiffs charged defendant as one of several joint tort-feasors, and the propriety of the District Court's action depends upon whether two agreements made by them with certain others of the joint tort-feasors amounted in law to a satisfaction and release of the tort, thereby discharging not only those expressly released but also defendant, as one jointly liable. * * *"

The court also observes that:

> "Plaintiffs brought an earlier action against certain of the joint tort-feasors in Indiana. Subsequent to judgment therein finding defendants guilty of fraud and directing them to account for property held in trust for plaintiffs and wrongfully converted by defendant. * * *" (Tr. 246.)

Thus the court correctly notes that the order of the court in Indiana was for accounting by the defendant trustees, but failed to note that the suit was in equity for such accounting. The court also failed to note another significant fact, *i. e.*, that the defendant here was a co-trustee with the Indiana defendants (we shall discuss the question of

trusteeship subsequently). After the court having so set forth some of the facts involved in the suits in Indiana and Illinois, it proceeds to examine the documents of April 16, 1942 and that of April 29, 1942, at all times considering the matter as that pertaining to joint tort-feasors and to nothing more.

As we heretofore pointed out, even on the theory of joint tort-feasors the court was in error when it found the two documents, contrary to Illinois law, to be releases. We also pointed out that even with reference to joint tort-feasors the Indiana law would not have considered the documents as releases. We also pointed out that the court erred when it disregarded the Indiana law, where the contracts were entered into, and gave its interpretation based exclusively on the Illinois law. To arrive at the decision, the court below was forced to disregard a number of factors which are apparent from the documents. The court disregarded that the parties' intention was to "compose and compromise" their differences, both of which words appear in the memorandum agreement of April 16th and undoubtedly mean a part satisfaction of the claim, even though it may terminate the litigation as to the parties to the agreement. That there was only a part satisfaction of the claim appears from the clear wording based on the agreement of the parties that the payment to be received by Petitioners is less than the claim they asserted (Tr. 185-191). Nevertheless the court below decided that:

> "The two instruments definitely disclose that it was the intention of the parties to compromise, settle fully and release the cause of action" (Tr. 248, 249).

We submit that there is no justification for the conclusion that the parties intended to release the cause of action, but, to the contrary, they intended and contemplated the exchange of mutual covenants not to sue (Tr. 195). The court below concluded that "in substance and actual intent,

as well nigh in actual form, the contracts constituted a release" (Tr. 249). This conclusion, is in contradiction to the wording of the document of April 29, 1942, which states that:

> "* * * The foregoing covenants not to sue and the acceptance of such mutual covenants not to sue by the parties hereto shall not be and is not to be taken to be a discharge or satisfaction of the whole or any part of the liability of the parties hereto, and shall not in any wise affect any claim which any party hereto has or may have against any person or corporation growing out of the operation of the Oxford Institute Contingent Bonus Fund * * *" (Tr. 197).

The Court below made its findings and conclusions on the basis that:

> "the legal liability of the parties * * * was that of joint tort-feasors" (Tr. 249).

indicating clearly that the matter before it was considered by the court purely and simply a legal proposition, disregarding completely the equity aspect of the case, as it disregarded any other law but that of the State of Illinois, as when it stated that:

> "* * * the attempted reservation of a cause of action against another of the joint tort-feasors was, under the Illinois law, as previously decided by this court, of no effect" (Tr. 249).

The court, thus having interpreted the Illinois law, found that the defendant in this case was discharged, thereby, it assumed that the laws of Illinois are the *lex loci contractus*. Such an assumption must be made because it was unanimously held that a discharge under the *lex loci contractus* is a discharge everywhere. So it was said in *Baker* v. *Wheaton*, 5 Mass. 509, 4 Am. Dec. 71; *Ogden* v. *Saunders*, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; and *Pugh* v. *Bussel*, 2 Blackf. (Ind.) 394, 2 Kent, 394. However, as the decision of the court below itself points out, the documents in question were drawn and executed in the State of Indiana,

which state will then supply the law applicable to the interpretation of the contract. That the legality of the contract is determined by *lex loci contractus* is recognized by the Illinois courts, as was done in the case of *Miller* v. *Wilson*, 146 Ill. 523, 37 Am. St. Rep. 186. To be sure there are certain exceptions to this general rule, but none of the exceptions are applicable to the instant case. The application of the Indiana laws to the interpretation of the contracts here involved "will not be injurious to public rights or morals"; it "will not contravene public policy"; it "does not violate a positive law of the *lex fori*." As a matter of fact, the application of the Indiana law and the rejection of the theory of release will favor right, justice and equity, and will support a "salutory public policy" without violating the laws of the State of Illinois. (As to the application of *lex loci contractus*, generally, and for exceptions from the rule, see Dicey, *Conflict of Laws*, page 542, also *Greenwood* v. *Curtis*, 6 Mass. 379, 4 Am. Dec. 145; *King* v. *Johnson*, 5 Harring (Del.) 31, 2 Sim. Ch. 194.)

The above rule applies in cases involving torts and joint tort-feasors, but this rule was disregarded by the court below.

There is, however, a further question which was left without consideration by the court below. It disregarded the fact that the Indiana suit and the instant suit were filed in equity. Petitioners prayed in both suits that the defendants be ordered to account.

There is a distinction to be observed between a legal and equitable claim and between the remedies pertaining to each, because:

> "In a judicial sense, the term 'equity' is employed usually in contradistinction to strict law, or *strictum et summum jus*. 'Equity jurisprudence,' said Mr. Justice Story, 'may properly be said to be that portion

> of remedial justice, which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law.' "
>
> Am. Jurisprudence, Vol. 19, p. 40.

The court below failed to observe that in an equity case, such as the instant one, will call for a ruling based on the standards and principles underlying equity jurisprudence. We believe that equity and conscience require that the interpretation of the contract be based on an approach which is going to do justice and will be equitable to the parties. The court below dissolved all doubt in favor of finding the documents to be releases and rejected not only any and all doubts against such finding, but rejected the clear wording of the documents and the express intention of the parties, which all pointed to the fact that the documents are nothing more than covenant not to sue. As to equitable proceedings it was said:

> "* * * the difference between the remedial justice of the courts of common law and that of the courts of equity is marked and material. That administered by the courts of law is limited by the principles of the common law (which are to a great extent positive and inflexible), and especially by the nature and character of the process and pleadings, and of the judgments which those courts can render. * * * The remedial process of the courts of equity * * * may be so varied as to meet the requirements of these equities, in cases where the jurisdiction of the courts of equity exist by 'commanding what is right, and prohibiting what is wrong'. In other words, its final process is varied so as to enable the courts to do that equitable justice between the parties which the case demands, * * *."
>
> Bishop on Equity, § 11.

We submit that in the instant case, and contrary to the decision of the court below, equity required that doubts, if any, as to interpretation of the contract, dissolved equi-

tably, thereby "commanding what is right and prohibiting what is wrong".

Wherever the courts of equity recognize equitable rights they will give equitable relief. The instant case was filed in equity. The prayer was for equitable relief and the court, so having recognized equity jurisdiction, equitable relief and considerations were in place. We recognize the maxim that equity follows the law, but we also point to the exception which exists in relation to those matters which will provide equitable relief because the rules of law would operate to "sanction fraud or injustice," as here. It is clear from the opinion of the court below that the judgment of the Indiana court found the defendants guilty of fraud and directed them to account for property held in trust for plaintiffs, and wrongfully converted by defendants (Tr. 246). It is also clear from the same opinion that the defendant here was a co-trustee and, as it is termed by the court, a joint tort-feasor with the Indiana defendants. To permit the defendant here to escape by the strict interpretation, or rather an exaggerated interpretation, of the rules of law, would operate to sanction fraud and injustice.

We know the maxim that equity will not permit a wrong without remedy. To permit the defendant here, who, by his answer, admitted participation with others,—who were found guilty of fraud by the Indiana court,—in the commission of certain acts, would create a case where there is a wrong without a remedy. Because of the trial court's failure to consider that the instant case involves equity jurisdiction, and because of its failure to apply the rules of equity, the case ought to be brought here for review.

IV.

The Court Below Erred in That It Decided the Case in Disregard of the Relationship of a Trustee and a Cestui Que Trust.

The court below properly found that the Indiana defendants were directed by the court there "to account for property held in trust for plaintiffs and wrongfully converted by defendant" (Tr. 246). It designated the defendant here "as one of the several joint tort-feasors" with the defendants in the Indiana suit (Tr. 246). After making such findings, however, it proceeded to disregard entirely the question of the relationship which existed between the Petitioners as *cestui que trust* and the defendant here as trustee. Such a relationship alone makes it just about unavoidable to resort to the equity court because, as Bogart in his book on Trusts and Trustees, said:

> "Ordinarily, relief should be sought by the *cestui* in equity". Sec. 871, p. 2536.

The same textbook sets forth that:

> "In many cases the remedy of a *cestui que trust* is in equity only * * * where the trust is open and the suit is for the settlement of an account and the recovery of an unliquidated sum. Equity has generally been held to have exclusive jurisdiction to aid the *cestui*, likewise where the basis of the suit is the negligence of the trustee in managing the trust property * * * or a breach of trust in neglecting to collect and apply the trust assets according to trust terms * * * or where the foundation is the conversion of the trust property and its proceeds by the trustee" (p. 2537).

The record here clearly discloses that the Petitioners sued the defendant, as trustee, for *statement of* an accounting and the recovery of an unliquidated sum. The amended complaint states (Tr. 58) that the defendant:

> "* * * was in charge of the Chicago office of said

Oxford, holding at all times the official title of Secretary-Treasurer; the direct management of the office, including keeping of the books, was under his immediate supervision; he received remittances coming into the office; made deposits in the bank; drew, or signed checks on funds deposited; and prepared, sent and filed reports. * * * A certain trust agreement was executed by said Oxford, by its President, Damon Smith and its secretary, A. A. Creaves * * * would create a certain trust under the supervision of five trustees * * * and A. A. Creaves, the defendant herein" (Tr. 58 and 59).

The amended complaint also set forth that:

"The defendant, A. A. Creaves, in conspiracy with the said Damon Smith and Edith Smith, and contrary to the provisions of said trust agreement, made investment of the funds entrusted to said trust and belonging to these plaintiffs * * * the said defendant A. A. Creaves, in utter disregard of the trust imposed upon him in accordance with the trust agreement, did * * *" (Tr. 60).

All this clearly establishes the relationship of a trustee and *cestui que trust*. The amended complaint also shows the need for an accounting, because it is stated that:

"The extent of such use that the proceeds so derived by the defendant A. A. Creaves is unknown to the plaintiffs and known by the defendant A. A. Creaves alone. He ought to be ordered to account to the plaintiffs therefor * * *" (Tr. 68).

The prayer of the amended complaint asks, among others, that:

"(1) the defendant A. A. Creaves makes a true and complete accounting of all moneys received by him * * *"; and

"(2) that the defendant A. A. Creaves make a full accounting of all moneys retained by him from the trust fund * * *" (Tr. 69).

Thus, on the face of the record there was error on the part of the court below in disregarding the relationship existing, which clearly establishes the defendant as a trustee for Petitioners.

As the *Restatement of Trusts*, ¶ 224(2), sets forth:

> "A trustee is liable to the beneficiary for breach of trust committed by a co-trustee if he:
>
> "(a) participates,
>
> "(b) improperly delegates administration,
>
> "(c) approves or acquiesces,
>
> "(d) fails to exercise reasonable care, thus enabling breach of trust,
>
> "(e) neglects to take steps to compel co-trustee to redress".

Under all these headings the defendant here was liable to the Petitioners as trustee. Defendants' answer admits the sale of trust fund Government bonds and the deposit of the proceeds in another account than that of the trust (Tr. 150). He admits the transfer of $15,350.00 belonging to the trust to the account of one of the defendants in the Indiana suit (Tr. 150). He admits that trust moneys were used for the purchase of lands by the defendants in the Indiana suit and the obtaining by him of certain oil incomes; admits the receipt by him out of such oil incomes of the sum of $16,800.00 (Tr. 150, 151). Such admissions bring the defendants' liability clearly under the above provisions of the *Restatement*, about which liability the *Restatement* (comments (a), p. 638) has the following to say:

> "Where several trustees are liable for a breach of trust committed by them jointly or for a breach of trust committed by one of them for which the others are liable under the rule stated in subsection (2), they are jointly and severally liable to the beneficiary for the breach of trust".

We submit that the court below erred when it disregarded the fact that defendant here was sued as a trustee

and that he was sued on an express trust, and further erred when it disregarded the fact that the suit was brought in equity for an accounting for an unliquidated claim. It cannot be maintained that the relationship here existing, based on an express trust, can be disregarded because the trustee was released. Even if there were to be a release, the release would not operate unless the *cestui* knew all the facts. From the record it clearly appears that the Petitioners (being the *cestui que trust*), did not and could not have any knowledge as to the facts and as to all the profits made by the defendant as trustee. The Indiana suit was terminated before an accounting was concluded and in consequence no actual information as to the facts or as to the total amount involved was known to Petitioners. Under those circumstances, it was said that:

> "Nor can any acquiescence be inferred until the *cestui que trust* has actual knowledge of the breach for the reason that it is the duty of the trustee to execute the trust and it is not the duty of the *cestui que trust* to make any inquiries. So, if the *cestui que trust* gets what he can from the wreck after a breach of the trust, and receives a part of what he is entitled to, he does not thereby waive his right to sue for the whole, when he can obtain it. * * * Wherefore, in order that the release, confirmation, waiver or acquiescence may have any effect, *cestui que trust* must have full knowledge of all the facts and circumstances of the case".
>
> Perry on Trusts and Trustees, 7 Ed., Vol. 2, pp. 1452, 1453.

The error of the court below, therefore, requires the exercise of this court's power of review.

Conclusion.

The case here presents important issues, among which are:

(1) The determination whether or not a contract executed in the State of Indiana during the pendency of a suit there, is to be interpreted by the laws of that state, or by the laws of the State of Illinois where a third party, not party to the Indiana suit, is brought before the court to account as trustee.

(2) Whether or not certain principles of law are applicable to suits in equity, and

(3) Whether or not trustees sued in equity on an express trust can be regarded simply as joint tort feasors, disregarding the relationship existing between a trustee and a *cestui que trust.*

The misapplication of the rule concerning *lex loci contractus* and *lexi fori* brought the decision of the court below in conflict with the decisions of the other Circuit Courts of Appeals. Thus, conflicts with the decisions of the lower courts, the proper interpretation of the state laws, the application of general rules pertaining to interpretations, and justice to Petitioners, require that the case be brought here for review.

Respectfully submitted,

FRANCIS HEISLER,
LEON M. DESPRES,
STANLEY F. EVANS,
J. J. GORDON,
Counsel for Petitioners.

FRANCIS HEISLER,
Of Counsel.

January, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 629

EDWARD M. BRYAN, et al.,

Petitioners,

vs.

A. A. CREAVES,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

MILTON G. MANASSE,
135 South LaSalle Street,
Chicago, Illinois.

JACOB LEVY,
PHILIP J. SIMON,
160 North LaSalle Street,
Chicago, Illinois,
Counsel for Respondent.

MILTON G. MANASSE,
Of Counsel.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Illinois

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List of Authorities Cited.

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To the Honorable The Supreme Court of the United States:

Petitioners' statement of The Facts will be supplemented by respondent in conjunction with his Argument hereinafter set forth. At this point, the respondent will confine himself to the making of two pertinent observations:

1. The decision of the Circuit Court of Appeals for the Seventh Circuit was rendered in a *unanimous* opinion.

2. The petitioners failed or neglected to file a Petition for Rehearing before the said Circuit Court of Appeals.

Summary of Argument.

1. The decision of the Circuit Court of Appeals, with respect to the release of the alleged cause of action against the respondent, adheres to the decisions of the courts of Illinois. Under the settled and established law of Illinois, the release of the respondent's joint tort-feasors had the effect of releasing the respondent as to all causes of action asserted by the petitioners for or on account of the alleged tortious acts of the respondent and his joint tort-feasors. *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, 151; *Welty* v. *Laurent*, 285 Ill. App. 13, 14; *Guth* v. *Vaughan*, 231 Ill. App. 143; *Kilham* v. *Chaloupka*, 195 Ill. App. 182, 185; *Gore* v. *Henrotin*, 165 Ill. App. 222, 224; *Vigeant* v. *Scully*, 35 Ill. App. 44, 46; *Chapin* v. *C. & E. I. R. R. Co.*, 18 Ill. App. 47, 50.

2. The rule of law, that the release of one joint tort-feasor operates as a release of the other joint tort-feasor, established by the Illinois decisions and applied in the case at bar by the Circuit Court of Appeals, is founded on sound public policy and is a salutary rule of law. *Chapin* v. *C. & E. I. Ry. Co.*, 18 Ill. App. 47, 50; *Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383, 386; *Rust* v. *Schlartzen*, 175 Wash. 331, 27 Pac. (2nd) 571, 573; *Sercey* v. *Hans Rees Sons*, 155 N. C. 296, 71 S. E. 310, 311; *McBride* v. *Scott*, 132 Mich. 176, 93 N. W. 243, 245.

3. The rule that a release of one joint tort-feasor releases all is applicable to joint torts of trustees. *First & Merchants National Bank* v. *Bank of Waverly*, 170 Va. 496, 197 S. E. 462, 465; *Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383, 385; *Braswell* v. *Marrow*, 195 N. C. 127, 141 S. E. 489, 491; *Whitford* v. *Reddeman*, 196

Wis. 10, 219 N. W. 361; *DeCock* v. *O'Connell*, 188 Minn. 228, 246 N. W. 885, 887; *Gibbs* v. *Redman Fireproof Storage Co.*, 68 Utah. 298, 249 Pac. 1032, 1034.

4. The petition for a writ of *certiorari* fails to show wherein the decision rendered by the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decision of any other circuit court of appeals on the same issue as that involved in the case at bar.

5. The said petition for a writ of *certiorari* fails to show wherein the decision of the Circuit Court of Appeals is in conflict with the decisions of the Illinois courts on the same issue as that involved in the case at bar.

6. There is no conflict between Illinois law and Indiana law in the case at bar. Illinois is the State wherein the alleged tortious acts of respondent took place and wherein action was instituted against respondent, and, therefore, only Illinois law can control.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The "Agreement" of April 16, 1942, and the "Indenture of Agreement and Covenant Not To Sue" of April 29, 1942, given by petitioners to certain defendants in the Indiana suit were releases in substance and in form and operated under the Illinois Law to release the respondent from any liability to the petitioners.

The agreement of April 16, 1942 (Tr. 185), was merely captioned "Agreement" by the parties. Even if the parties had chosen to give it any other name, such action would not be conclusive on the court, and it would still be necessary to determine the actual nature of the agreement. Similarly, designation of the agreement of April 29, 1942 (Tr. 195) as "Indenture of Agreement and Covenant Not to Sue" is not binding upon the court, and the true nature of the instrument is controlling.

In *Jenkins* v. *Southern P. Co.*, 17 F. Supp. 820, 830 (reversed on other grounds in 96 F. 2d 405), we find:

> "An instrument must be given the effect it bears on its face. It is true * * * that when an instrument states specifically that it is a covenant not to sue, the court cannot interpret it in any other way, *and read into its words of release.* But the converse is also true, that is, if the instrument shows on its face that it is, in truth, a release of a particular claim, and the claim is identified, it amounts to a general release of the cause of action, although the word 'release' is not actually used. Here, three other verbs are used which,

actually, achieve a release, to-wit, *refrain from instituting, pressing, or in any way aiding.* And this release is intended to affect any other cause of action which may exist from the beginning of the world until the present time.

It is evident that when this is the result arrived at, the mere fact that the parties entitle an instrument of settlement a 'Covenant Not to Sue' means nothing. The instrument must be given the effect it bears. And when we interpret this instrument, in the light of the circumstances, and in the light of the fact that the cause of action was pending and coming on for trial; that a settlement was made; and $2,500.00 paid; that a dismissal was had; that the probate court approved and confirmed it, and authorized the settlement and the dismissal of the cause of action, we are confronted with a release.

To give to such instrument, under such circumstances, the effect of a mere covenant not to sue, would be allowing form to take the place of substance, and words the place of acts."

Under Illinois law the release of one or more joint tortfeasors releases the other, regardless of the intention of the parties; while a mere covenant not to sue has no such effect. (*Wallner* v. *Chicago Traction Co.*, 245 Ill. 148; *City of Chicago* v. *Babcock*, 143 Ill. 358; *West Chicago Street Railroad Co.* v. *Piper*, 165 Ill. 325; *Ennis* v. *Pullman Palace Car Co.*, 165 Ill. 161.)

The only controversy which arises under these rules is whether any given settlement agreement is a release, or a covenant not to sue. Some of the Illinois cases wherein the distinction between releases and covenants not to sue was considered are *City of Chicago* v. *Babcock*, 143 Ill. 358, *C. & A. Railway Co.* v. *Averill*, 127 Ill. App. 275, *Gore* v. *Henrotin*, 165 Ill. App. 222, and *Dixmoor Golf Club, Inc.* v. *Evans*, 274 Ill. App. 517.

In the *Babcock* case, the agreement was as follows:

> "It is hereby agreed that no action shall be begun against Joseph Le Cardi, by reason of any matters existing at this date, by the undersigned. Given for good consideration." (page 364.)

The court said (p. 366):

> "This, on its face, was simply an agreement or covenant not to sue."

The court indicated, however, that if the evidence had shown that the money paid for this agreement was received in satisfaction of the damages, there would have been an accord and satisfaction.

The agreement in the *Averill* case was (p. 278):

> "that she will not sue * * *; but it is hereby agreed and understood that this contract shall not be or be held or construed to be a release of any damages or right of action arising to said first party * * *."

On its face, the agreement did not purport to be a release even to the party to whom it was given. Very properly, therefore, the court said (p. 279):

> "The agreement in question is on its face merely a covenant not to sue; not a release or satisfaction of damages, but only a payment in part of the same."

In the *Henrotin* case, it was even held that parole evidence was admissible to show that complete settlement and release was intended, even though the contract, on its face, was just a covenant not to sue.

In the *Evans* case, the settlement memorandum showed receipt of a sum of money "as payment on account of the alleged liability of said S. K. Wheeler under the terms of said decree." Complainant agreed that before it would attempt to collect any additional moneys from Wheeler or attempt to enforce the decree against any money or

property owned or after-acquired by Wheeler, or pursue any other legal remedy to collect any additional sums under the decree, it would first exhaust its remedies against all the other defendants. The court said (p. 522):

> "This settlement was clearly not an accord and satisfaction. It was merely a payment on account, without releasing Wheeler from any further liability. His status, as jointly liable under the decree, was exactly the same as it was prior to the making of this agreement. All that the complainant did was to agree to suspend action against Wheeler until it had exhausted its remedies against the other defendants, reserving the right to call upon Wheeler for additional sums due under the decree. We hold that complainant made no settlement with Wheeler resulting in a release of its claim against the two other defendants, Weinberger and Kendrick."

Petitioners argue that an instrument which releases one joint tort-feasor, and reserves suit-rights against other joint tort-feasors, will be considered to be a covenant not to sue, and not a release. They argue specifically that the instruments here in question are not releases.

The cases cited by petitioners are those in which the language used released no one, and were thus cases of true covenants not to sue, and not releases at all. Such cases do not, therefore, prove, or even bear upon, petitioners' point.

Petitioners quote from paragraph 7 of the agreement of April 16, 1942 (Tr. 187), to the effect that the parties will not sue each other, and that rights of action against the respondent here shall remain unimpaired. Standing alone, that much of the agreement as is thus quoted by petitioners would constitute a covenant not to sue, and

not a release. Petitioners neglected, however, to quote the very first clause of said paragraph 7, reading as follows:

> "This agreement shall constitute a full settlement of differences and claims between the parties hereto,"

In discussing the agreement, petitioners also neglected to mention paragraph 14 (Tr. 190), which provides that "All claims of first parties against * * * Oxford Institute Bonus Account or the Trustees thereof * * * are merged in this agreement."; paragraph 17 (Tr. 191), releasing all claims to personal property of Damon Smith; and paragraph 18 (Tr. 191), agreeing to protect Smith against any and all liability to petitioners (and thus protecting Smith from third-party procedure in this action, by the respondent here).

In *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, an agreement denominated "Covenant Not to Sue" was held to be a release and payment of judgment against both defendants, notwithstanding such was not the intention of the parties as expressed in the agreement. The injured person, having obtained a judgment against joint tort-feasors, entered into an agreement with one such tort-feasor which provided in substance that, in consideration of a stated payment, the complainant agreed to take no action, either in law or equity, or to prosecute any writ of execution to obtain satisfaction of the judgment from said tort-feasor in any form or manner whatsoever and agreed to be precluded "from asserting any rights against the said Chicago Railways Company he may have heretofore had to prosecute and collect his said claim for personal injuries to the undersigned against it."

In *Bee* v. *Cooper*, 217 Cal. 96, 17 P. 2d 740, seven former directors of a corporation and other participating parties

were sued for alleged fraudulent disposition of assets of the corporation pursuant to an alleged fraudulent conspiracy. The complaint alleged the fraud in detail, and it was further alleged that as a result of such fraud each of the defendant secured a portion of the diverted assets. Plaintiffs sought damages for the fraud.

In disposing of the case, the court said (p. 741):

> "The evidence shows that, subsequent to the commencement of this action, the plaintiffs and five of the defendant directors entered into a written 'Settlement Agreement' whereby, in consideration of said five defendants paying over to a trustee the respective portions or percentage of the money and other property received by them as the result of the alleged illegal and fraudulent conspiracy, the plaintiffs agreed to settle and dismiss this action as to said defendants. Thereafter, and pursuant to this agreement, five of the defendant directors did pay over said moneys to a trustee, and this action, at the request of the plaintiffs, was dismissed as to them. The agreement was not a mere covenant not to sue, as appellants would have us construe it. A reading of the instrument very definitely discloses that it was the intention of the parties thereto to fully settle, compromise, and dismiss the cause of action here sued on, in so far as certain defendants are concerned. * * * The dismissal was on the merits, and intended to settle the differences and obligations between the parties growing out of the cause of action set forth in the complaint."

Again, petitioners point out that the documents in this case expressly state that the petitioners here received in compromise less than the sum claimed. But that was also true in the *Cooper* case. The release there was given to defendants who paid over only "the respective portions and percentage of the money and other property received by them as the result of the alleged illegal and fraudulent

conspiracy." Appellants there, as the petitioners here, sought to have the instrument in question construed as a covenant not to sue, but the court refused to do so, saying (p. 742):

> "The agreement was not a mere covenant not to sue, as appellants would have us construe it. A reading of the instrument very definitely discloses that it was the intention of the parties thereto to fully settle, compromise, and dismiss the cause of action here sued on, in so far as certain defendants are concerned."

In the recent case of *Aiken* v. *Insull*, 122 F. 2d 746, (cert. denied, 315 U. S. 806), which case originated in the U. S. District Court for the Northern District of Illinois, we find (at page 752):

> "In our case the settlement agreement, read in its background of approval orders and confirmation decrees, discloses very definitely that the parties intended to settle and compromise the cause of action sued on, in so far as the banks were concerned. The debenture holders and the trustee in bankruptcy not only released their claims for damages against the banks, but they waived whatever interest they had in the collateral and confirmed title thereto in the banks. In return the banks cancelled the bank indebtedness of I. U. I., waived their claims against the estate of the bankrupt corporation, and paid almost $3,500,000 in cash. There can be no real controversy as to whether the settlement and compromise agreement was a release to the banks or merely a covenant not to sue the banks. We are satisfied that in substance (actual intent) as well as in form (language employed), the instrument constituted a release."

Another, even later, case, which also originated in the U. S. District Court for the Northern District of Illinois, was that of *Reconstruction Finance Corporation* v. *Central*

Republic Trust Co., et al., 127 F. 2d 242, (cert. denied, 317 U. S. 660). There, in an action against stockholders of a closed bank, for $229,402.52 claimed chargeable to the bank on settlement of its accounts as Trustee, release of the bank as to any liability over $25,000, with a reservation, however, of the right to continue, against the stockholders, the claim for the excess over $25,000, and with a specific agreement that fixing of the bank's liability at $25,000 should not be deemed an adjudication of the extent of damages suffered, was pleaded by the defendant stockholders as a release of the action against them for such excess.

The court in discussing the case said (p. 244):

> "The master thought that * * * release of the bank also released the stockholders * * * regardless of the attempted reservation of the right to recover * * * from the stockholders.
>
> We agree that these conclusions of the master are sound and they are supported by the following authorities cited by him to the effect that * * * a release of one person releases the other in spite of any attempted reservation of rights against the other partners. *Rice and Wiley* v. *Webster*, 18 Ill. 331; *Benjamin* v. *McConnel*, 4 Gilman 536, 9 Ill. 536, 46 Am. Dec. 474. It is contended by appellant, however that the last two cases cited were overruled by *Parmelee* v. *Lawrence*, 44 Ill. 405. We think there is no merit in this contention."

Except for the added feature, here, of dismissal of the Indiana case **with prejudice**, the Insull case is quite comparable to the instant case. The settlement agreement there, as here, included an attempted reservation of rights against persons not parties to the settled suit. The settlement there was approved by the court. The settlement agreement here was dictated by the Master (Tr. 164), and

some of the settlement deeds here were submitted to the Indiana court for approval (Tr. 165). On page 750 of the opinion, the court said:

> "The settlement took the form of a petition embodying its terms, which was filed with the District Court having charge of the Chicago bank suits and of the bankruptcy case of I. U. I. On November 4, 1937, the District Court approved the petition, and in part (4) of its decree stated that 'The settlement and compromise set forth in paragraph 26 of said petition is fair, just and equitable.' On February 24, 1938, an order was entered in the consolidated case No. 12357, which confirmed the settlement, vested title to the collateral in the Chicago banks, and *enjoined the debenture holders from the prosecution of further suits against the banks.*" (Emphasis supplied.)

And, at page 752, we find:

> "There can be no real controversy as to whether the settlement and compromise agreement was a release to the banks or merely a covenant not to sue the banks. We are satisfied that in substance (actual intent) as well as in form (language employed), the instrument constituted a release."

The case at bar fits into the pattern of the cited cases which held that a release was effected and it differs considerably from the cases where agreements were held to be, merely, covenants not to sue.

The agreement of April 16, 1942 was negotiated in open court (Tr. 164). It provides, *inter alia*, as follows (Tr. 185-192):

> "Whereas, the parties hereto are parties plaintiffs and defendants in a certain litigation now pending in the district Court of the United States for the Southern District of Indiana, Indianapolis Division, being Civil Cause No. 405, and

Whereas, said parties are desirous of **composing and compromising their differences** without further litigation. (Emphasis supplied.)

No, Therefore, it is agreed by the parties, for and in consideration of their mutual agreements and further considerations herein expressed as follows:

(1) A Stipulation shall be entered into before the Special Master, disposing of the said action according to the terms of this memorandum.

(2) * * * (Provision for payment of court costs, trustee's fees, etc., 'and the fees of attorneys for Defendants' out of funds held in trust under court order.) 'Should there be a balance left in said trust, the same shall become the property of' Damon and Edith Smith.

(3) * * * (conveyance of farm lands, etc., subject to $20,000.00 of mortgages placed thereon pending the litigation) 'and said mortgages, assessments and taxes shall be assumed by first parties and third parties shall be released by first parties from all liabilities thereunder.'

(7) **This agreement shall constitute a full settlement of differences and claims between the parties hereto,** accruing up to this date, and the parties agree not to sue each other or the Oxford Institute or the National Funding Corporation on any claims accruing up to this date, involved in this cause or referred to herein. (Emphasis supplied.)

As to suits now pending in the United States District Court in Chicago, between certain of the first parties as plaintiffs and A. A. Creaves, Oxford Institute and National Funding Corporation, as defendants, it is agreed that no judgment shall be taken against either Oxford Institute or National Funding Corporation, and proper instruments shall be executed to safeguard said corporation accordingly, but the right to continue such actions to judgment versus A. A. Creaves shall remain unimpaired and this agreement shall constitute no release of any liability of said A. A. Creaves to any parties hereto.

(14) **All claims of first parties against** Oxford Institute or **Oxford Institute Bonus Account or the Trustees thereof** and all claims of Oxford Institute or Oxford Institute Bonus Account or the trustees thereof against first parties, occurring up to this date, **are merged in this agreement.** (Emphasis supplied.) (And note that the claim herein against Creaves is based on his having been a trustee of the Oxford Institute Bonus Account.)

(15) All shares of stock in National Funding Corporation belonging to the first and second parties and all such stock now deposited with the Clerk of the Court by said parties shall become the property of the third parties and shall be properly endorsed, and it is agreed that such stock, so deposited, is all the stock to which third parties are entitled from first parties. Said stock does not include the shares of stock now held by Burke E. Whitaker.

(17) **First parties release any and all claims to any livestock, chattels or other personal properties of the third parties or of Production Credit Corporation of Rushville, Indiana, and any claim of any interest in any assets of National Funding Corporation or Oxford Institute or third parties.** (Emphasis supplied.)

(18) **First parties shall protect, by appropriate agreement, Damon Smith, Edith Smith, Joseph Smith, Oxford Institute, and National Funding Corporation from any and all liability to first parties,** and the parties named shall protect first parties from any and all liability whatsoever, but nothing in this agreement shall constitute the release of any liability of said A. A. Creaves to any parties hereto. (Emphasis supplied.)

(19) It is further agreed that the claims asserted by the first parties against the third parties exceed the value of the land which is to be conveyed by the third parties to the trustee named for the use and benefit of the first parties, and **if any suits or actions are hereafter brought by any former Oxford Institute sales-**

man, or his duly authorized representative, to establish a trust in or impress a lien upon such land, or any part thereof, by virtue of any matter connected with his former employment as such salesman with Oxford Institute, such suits and actions shall be defended jointly by the first and third parties, each paying one half of such defense, and one half of any amount or amounts paid in settlement thereof, and one half of any final judgment rendered in any such suit or actions;" (Emphasis supplied.)

The provisions of paragraph 7, concerning the present action, that "no judgment shall be taken against either Oxford Institute or National Funding Corporation, and proper instruments shall be executed to safeguard said corporation accordingly," are wholly inconsistent with the theory or office of a covenant not to sue. This is particularly apparent when it is realized that the clause even effects an indemnification against third party action by the respondent here, and would necessarily eliminate any liability of the respondent, wherein judgment could be entered against the corporations as third party defendants in this action. The same observation applies to paragraph 18.

Probably no so-called covenant against suit ever went as far as the bold type portion of paragraph 19. This is not only *not* a covenant against suit, but actually a covenant to engage in future litigation, wherein either party might not otherwise be joined.

The agreement of April 16, 1942 (Tr. 185) was necessarily executory and preliminary in character, when drawn. The understanding expressed thereby, however, was wholly consummated, and it is now an executed agreement.

The real estate transfers and oil rights assignment to

petitioners, required by the agreement, were made by deeds and assignment from Damon and Edith Smith and by the trustee's deeds and assignment. The trustee's deeds and assignment were submitted to the Indianapolis court, and the court endorsed its approval thereon. (See Order, Tr. 193.) On the stipulation of the parties (paragraph 15 of the agreement, Tr. 190), the court ordered delivery of the National Funding Corporation stock to Damon and Edith Smith. (See Order, Tr. 194.) And then, **on stipulation of the parties** (Exhibit F, Tr. 198), **the court entered an order** (Exhibit G, Tr. 200) **dismissing the action, with prejudice as to the petitioners herein.** In further consummation of the agreement, petitioners moved, in the district court for Illinois, for dismissal of the defendants, Oxford Institute and National Funding Corporation, and such dismissal was granted, May 26, 1942 (Tr. 53 and 54).

The "Covenant", on which petitioners rely so heavily, must be taken for what it was—merely one step in consummation of the agreement of April 16, 1942. The "Covenant" is not, under the cases cited, a true covenant, but is merely evidence that the claim had *already* been extinguished. This is demonstrated by the following language from the "Covenant" (Tr. 195):

> "* * * whereas, under date of April 16th, 1942, the parties hereto entered into an agreement **completely compromising and disposing of all differences between the parties hereto,** which agreement was embodied in a stipulation made in open court in said Cause; and
>
> Whereas said stipulation and **agreement contemplated the exchange** of mutual covenants not to sue the parties thereto, and the exchange **of such assurances that the controversy between the parties had been finally terminated**; and
>
> Whereas said **Civil Action 405 was heretofore dismissed** by stipulation of the parties and by order of

> the Court **with prejudice against the revival of said action or any claims asserted therein.**" (Emphasis supplied.)

We can readily agree with petitioners that mere dismissal of a suit against one joint tort-feasor will not constitute a dismissal against other joint tort-feasors. But here, **the dismissal of Smith was with prejudice** (Tr. 200) and **such is not a mere dismissal.** We respectfully submit that the agreements and actions of the parties in the Indiana action effected a full release of Damon Smith and so, by operation of law, of the respondent herein.

Petitioners argue that effect should be given to the intention of the parties, when an instrument shows on its face an intention to reserve a right to sue some of the joint tort-feasors. The instruments here in question did, of course, express such intent. Such intent was also expressed, however, in the agreement considered in the cases of *Aiken* v. *Insull*, 122 F. 2d 746, and *Reconstruction Finance Corporation* v. *Central Republic Trust Co., et al.*, 128 F. 2d 242. A similar intent seems to have been expressed in the agreement considered by the Appellate Court for the First District of Illinois in the case of *Petroyeanis* v. *Pirola*, 205 Ill. App. 310. The expressed intent was not allowed to overcome the fundamental nature of the release in any of those cases.

The question was specifically dealt with in the *Insull* case, as follows (p. 752):

> "The controversy resolves itself into whether certain language contained in one paragraph of the release instrument, manifesting an intent to reserve the cause of action against the directors of I. U. I., is to be given effect. This paragraph provides that 'Nothing in this agreement of settlement and compro-

> mise * * * shall be construed to operate as a release or to affect any causes of action, claims or demands * * * against any person * * * other than any party to this settlement and compromise * * *' Of course the plaintiffs urge the application of *Parmelee* v. *Lawrence*, and the defendants the technical common law rule of release.
>
> We need only add, on the strength of our case-law analysis made earlier in the opinion, that the *Parmalee* formula is not applicable in tort cases. Hence we are compelled to conclude, as did the District Court, that the reservation of the cause of action against the former directors of I. U. I. was void because repugnant to the operation of the release. We believe, as do the plaintiffs, that Section 885 of the Restatement of the Law of Torts (1939), which has modified the Illinois rule of release, is the superior view in these matters, but our task is to apply the local law, not the Restatement."

The question was similarly dealt with in the *Central Republic Trust Co.* case.

Wholly aside from such controlling principle of law, it may be noted that petitioners' intention to dispose of their differences with Smith, and to reserve their claims, if any, against the respondent here, could adequately have been effected by a true and mere covenant not to sue, and by dismissal of the action against Smith without prejudice, rather than with prejudice, as was done.

The conclusive nature of the release effected by the parties is not changed because petitioners allegedly accepted in settlement less than the entire amount of their claim. Assuredly, less was paid than was claimed in all of the cases which held actions against joint tort-feasors barred by release of other joint tort-feasors; otherwise, there would have been no point at all to the filing of suit against

the other joint tort-feasors. Conversely, if the full amount claimed had been paid, the decisions barring further suit would have been specifically grounded on the fact that nothing remained to be paid. Actually, the principle that a release of one releases all is founded on the proposition that the amount paid for the release given is accepted in full satisfaction of the claim. (*Bee* v. *Cooper*, 217 Cal. 96, 17 P. 2d 740.)

By the settlement, petitioners waived many items which were recoverable from Smith. They permitted (Par. 2, Tr. 185) over $7600.00 of funds held by the trustee to be expended for payment of Smith's attorneys' fees, Master's fees, etc., which were all chargeable to Smith in the light of the court's order overruling objections to the Master's Report. They turned over to Smith (Par. 15, Tr. 190) their stock of National Funding Corporation. That act must be held to be voluntary for, even though tender of the stock might be required of them, delivery would not be required except on complete satisfaction of their demands. They released all claims (Par. 17, Tr. 191) to property of Damon and Edith Smith, Oxford Institute and National Funding Corporation; and, finally, they got 2733 acres of land (including oil land returning a royalty of $450.00 per month, per Heisler's statement on the argument in the lower court), unquestionably worth much more than any amount converted by Smith.

It but remains for the respondent to take passing note of the Illinois cases cited by petitioners under Point I of their argument. A cursory examination of these cases will serve to confirm the Illinois law on the subject; namely, that the release of one joint tort-feasor releases all, while a covenant not to sue releases no one. Thus in *City of Chicag* v. *Babcock*, 143 Ill. 358, (which is desigated by peti-

tioners as "the leading Illinois case on the subject"), the court said the following on page 366 of the opinion:

> "A release to one of several tort feasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others."

In *West Chicago St. R. R. Co.* v. *Piper*, 165 Ill. 325, the court reaffirmed this same principle of law, saying on page 328:

> "A release to one of several joint tort feasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others. (*City of Chicago* v. *Babcock*, 143 Ill. 358.)"

In *C. & A. Ry. Co.* v. *Averill*, 224 Ill. 516, the court construed the document in question as being purely and simply a covenant not to sue, saying on page 521 of the opinion:

> "It is next insisted by appellant that the release executed by appellee to the street car company was also a release of appellant, *under the well known rule that a release of one tort feasor is a release of both.* An examination of the record, however, does not bear out this contention, for the reason that the agreement between the appellee and the street car company *was not a release within the meaning of that rule.*" (Emphasis supplied.)

The petitioners aver, at page 21 of their Brief, that the Circuit Court of Appeals "erred further because its decision is contrary to the law of the State of Illinois. It is contrary to the decision in the case of *Vandalia R. R. Co.* v. *Nordhaus*, 161 Ill. App. 110." What is the principal of law followed by the Illinois Appellate Court in that case? It is set forth on page 113 of the opinion as follows:

> "A release to one of several joint tort feasors is a release to all and an accord and satisfaction with one of them is a bar to an action against the others. *City*

of Chicago v. *Babcock*, 143 Ill. 358; *West Chicago Street R. R. Co.* v. *Piper*, 165 *id.* 325.

A covenant not to sue one of two or more tort feasors does not operate as a release of any of them and they cannot invoke the covenant as a bar to the action. *City of Chicago* v. *Babcock, supra; C. & A. Ry. Co.* v. *Averill*, 224 Ill. 516."

The last Illinois case cited by petitioners is *Wallner* v. *Chicago Consolidated Traction Co.*, 245 Ill. 148. However, it is difficult to perceive what degree of comfort can be gleaned therefrom by the petitioners. On page 151 of the opinion, the Illinois Supreme Court had the following to say:

"There is no doubt that a release of one of several joint tort feasors releases all and that an accord and satisfaction by one joint tort feasor has the same effect as to all. (*City of Chicago* v. *Babcock*, 143 Ill. 358; *West Chiago Street Railroad Co.* v. *Piper*, 165 *id.* 325.) It is equally certain that payment and acceptance of a sum of money in satisfaction of an unliquidated demand is a good accord and satisfaction. (*Ennis* v. *Pullman Palace Car Co.*, 165 Ill. 161.)"

The above five cases cited by petitioner must be taken as their strongest array of Illinois authorities to sustain their argument. The respondent respectfully submits that these cases forcibly serve to uphold his contention; namely, that the release of the Indiana defendants operated as a release of his alleged liability to the petitioners. Certainly the Circuit Court of Appeals, after reviewing all the Illinois cases applicable to the one at bar, arrived at the same inevitable conclusion—that the petitioners, in releasing the Indiana defendants and dismissing their Indiana action *with prejudice*, had received an accord and satisfaction and were barred from prosecuting the present action against the respondent.

II.

The decision rendered in the case at bar by the Circuit Court of Appeals for the Seventh Circuit is not in conflict with applicable decisions of other Circuit Courts of Appeals.

No decision of any other Circuit Court of Appeals is cited by petitioners in support of their claim that the decision herein is in conflict with the decision of other Circuit Courts of Appeals. The respondent, in turn, has not found any decisions of any other Circuit Courts of Appeals which do, in fact, conflict with the decision rendered herein, on the facts of this case.

The real point that petitioners are trying to make is that, assuming a difference between the laws of Illinois and the laws of Indiana, the agreements in this case, executed in Indiana (being the agreements of April 16, 1942 and April 29, 1942) must be *interpreted* under the laws of Indiana.

There are two vital weaknesses to this assertion. In the first place, this position is taken by petitioners for the first time in this Court. It was never raised by them in the District Court, nor in the Circuit Court of Appeals. As a matter of fact petitioners said, at page 12 of the Reply Brief filed by them in the Circuit Court of Appeals on June 25, 1943:

> "We respectfully submit that our contention that the documents in question are not releases, and that they have the effect of a Covenant Not to Sue are fully supported by authorities cited in our brief. *We come not to plead that the Illinois rule on this point be overruled; we ask that the Illinois law be followed in our case.*" (Emphasis supplied.)

Even in the Petition filed here (at page 27 thereof) they say:

> "Petitioners, in executing the two documents here in question, *were not unmindful of the Illinois law* and framed the documents so that they might be brought under the decision in the case of *C. & A. R. R. Co.* v. *Averill, supra.*" (Emphasis supplied.)

In the second place, the court's task is not to *interpret* the agreements, but to determine their effect, and the effect of petitioners' other actions. Respondent's actions, complained of by petitioners, are all charged to have occurred in Illinois and the suit against him was filed in Illinois. It is, therefore, the Illinois law under which a determination must be made as to whether he has or has not been released. Taken all together, the agreement of April 16, 1942, and the action of the parties thereunder, including the agreement of April 29, 1942, the making and acceptance of the various conveyances and transfers, the stipulation for dismissal of the Indiana action *with prejudice*, and the actual dismissal of that action *with prejudice*, clearly released respondent under the laws of Illinois, as heretofore shown.

The respondent fails to show that any conflict of laws exists in this case or that the Indiana law is in any manner applicable thereto. Illinois is the situs wherein the alleged tortious acts of the respondent were committed—the *loci delictus;* it also is the State wherein the petitioners instituted and maintained their action against the respondent—the *loci fori.* Can it seriously be contended, then, that the defenses available to the respondent are to be governed and controlled by what is alleged to be the law of Indiana? The respondent submits that this would be an anomaly without precedent or support in the entire history of legal jurisprudence.

III.

The termination of an equity suit in the Federal Court in Indiana by a dismissal thereof with prejudice, pursuant to a release of the defendants therein, will operate as a release of the respondent being sued in Illinois as a joint wrongdoer with the same defendants.

Lest there be any doubt whether the clothing of petitioners' action in what is, apparently, an equity action, affects the rule for release of a joint tort-feasor, we submit the following, from the case of *Bee* v. *Cooper*, 217 Cal. 96, 17 P. 2d. 740, 742:

> "* * * There is no room for argument upon the question as to whether this complaint is upon a cause of action *ex contractu* or upon one sounding in tort. While the appellants describe the action as one in equity to recover certain corporate assets alleged to have been improperly transferred by the board of directors, the action contains nothing more than a charge *ex delicto* against the directors and their co-defendants for fraudulently conspiring to divert the corporate assets. Applying to this case the reasoning employed in *Chetwood* v. *California Nat. Bank*, *supra*, there can be no doubt but that the cause of action here alleged sounds in tort, and that the several defendants are charged as joint tort-feasors. The gravamen of the complaint is the alleged collusion and fraudulent plan asserted to have been conceived and executed by the defendants for the purpose of diverting the corporate assts. It necessarily follows, therefore, that the release and discharge of some of the joint tort-feasors, in consideration of their payment to appellants of certain moneys for the loss and damage suffered by reason of the tort complained of, works a release of the remaining joint tort-feasors."

In *First & Merchants Nat. Bank* v. *Bank of Waverly*, 170 Va. 496, 197 S. E. 462, banks A and B qualified as executors and trustees of an estate. Thereafter, Bank A, as Trustee and with trust funds, purchased from itself certain mortgage notes. The notes were not collected at maturity, and not reduced to judgment. Thereafter Bank A was declared insolvent, and a receiver appointed. Bank C was appointed administrator and trustee in place of Bank A.

The parties interested in the estate ascertained that they had suffered a loss by the default of Bank A, and filed claim for such loss in the proceedings for A's liquidation. A's receiver answered, denying liability. The issues raised by the petition and answer were settled by the receiver agreein to pay the estate one-half of the total loss.

In an action against Bank B, the original co-trustee, for the other half of the loss, the court said (p. 465):

> "That the present action is one of tort can not be questioned. The notice of motion filed in the case is grounded upon the negligence of the defendant. There was but one single cause of action and it grew out of the wrongful conduct of the co-trustees. While the co-trustees are jointly and severally liable in tort for the injury caused by their negligence or misconduct, the satisfaction of the cause of action made by one for the mischief wrought discharges the other. It is similar in its operation to an accord and satisfaction. This is true, even though the parties did not intend to discharge the other joint wrongdoer. *Bland* v. *Warwickshire Corporation, supra.*"

In conclusion, the respondent submits that the dismissal *with prejudice* of petitioners' Indiana suit, pursuant to a release executed in favor of the defendants in that action, operated as a release of the respondent in the case at bar.

IV.

The Circuit Court of Appeals did not decide the case in disregard of the relationship between a trustee and a cestui que trust.

Under Point IV of their argument, the petitioners contend that the rules of construction governing release of ordinary tort-feasors should not be applicable to a case involving persons who stand in a fiduciary relationship. They quote from Perry on Trusts and Trustees, 7th Edition, Volume 2, pages 1452 and 1453, in an ostensible effort to sustain this position. The material quoted, however, does not support the principle claimed for by petitioners. Furthermore, the quotation as set forth by petitioners includes three asterisks to show omission of what would naturally be assumed to be irrelevant matter. Actually, what petitioners there omitted was the following:

> "A release of the principal in a breach of the trust is a release of all parties who would be liable secondarily or as sureties.", citing *Blackwood* v. *Burrowes*, 2 Con. & Laws. 478.

The claim asserted against the respondent here is surely a secondary liability to that of Smith.

Directly in point in response to petitioners' argument is the following, from *First & Merchants Nat. Bank* v. *Bank of Waverly*, 170 Va. 496, 197 S. E. 462, 465:

> "The rule of law, so well established in Virginia, by the cases referred to, is subject to no known exceptions. The fact that the wrong grows out of the mis-conduct of co-trustees constitutes no exception to the rule of which we are aware. These fiduciary wrongdoers are just as much joint wrongdoers as any other joint tort-feasors. There is just one cause of action

against them. When one of them satisfied that single cause of action the other was released. There can be no bar until there has been satisfaction for the wrong done (Code § 6264) but when once the wrong has been satisfied by one, that constitutes a complete bar to any action that may be instituted against the other."

In *Braswell* v. *Morrow*, 195 N. C. 127, 141 S. E. 489, complaint was filed to recover losses suffered by a corporation because of (a) negligent mismanagement by the secretary-treasurer, who was also a director, and (b) negligence and carelessness of the directors, in failing to supervise or restrain the secretary-treasurer, and require a proper performance of his duties. A settlement of the claim against the secretary-treasurer, releasing "all claims of whatsoever nature and kind" against the secretary-treasurer, was held to dispose of the claims against the directors.

To the same effect are the cases of *Whitford* v. *Reddeman*, 196 Wis. 10, 219 N. W. 361; *DeCock* v. *O'Connell*, 188 Minn. 228, 246 N. W. 885, 887; *Gibbs* v. *Redman Fireproof Storage Co.*, 68 Utah 298, 249 Pac. 1032, 1034.

At page 37 of their brief, petitioners claim that they had no knowledge, at the time of the Indiana suit, of the profits claimed to have been made by the respondent here. This contention is controverted by their own statement, at page 8 of the petition filed herein, that the allegations which appear in the amended complaint in this suit and which did not appear in the complaint filed in the Indiana suit were based on the testimony of the defendants in the Indiana suit. Further, an inspection of the Master's Report in the Indiana case will conclusively demonstrate that petitioners knew all of the facts here claimed upon when they settled that case. The settlement was negotiated by counsel, with the assistance of the court, at the conclusion

of hearings which ran on for weeks (Tr. 70-71) filling a Transcript of over 2500 pages (Tr. 223) and resulting in a Master's Report of 142 pages (Tr. 70-144). It is clear that petitioners knew the material facts and their rights thereon.

CONCLUSION.

The case at bar has been decided adversely to petitioners by both the District Court and the Circuit Court of Appeals in a unanimous opinion. The petitioners even failed to avail themselves of their opportunity to file a Petition for Rehearing before the Circuit Court of Appeals; yet they now petition for a writ of *certiorari* without showing a single substantive ground for the assumption of jurisdiction by this court.

The major issue that petitioners argue, and an issue which they seek to raise for the first time before this court, is whether the defenses available to the respondent are to be governed by Illinois law or Indiana law. Unquestionably Illinois law does control; and it would seem that if petitioners had considered their point meritorious, they would have raised it in the lower courts in the first instance.

The petitioners have received an accord and satisfaction, have seen fit to release the Indiana defendants and have dismissed their Indiana action with prejudice. The fact that they likewise released the respondent by so doing does not detract from the benefits accruing to them by reason of their having concluded their Indiana litigation. Certainly it should not serve as an incentive to protract the litigation against the respondent in Illinois, since protracted litigation is neither a means to an end nor an end to a means.

Wherefore, the respondent respectfully submits that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

MILTON G. MANASSE,
JACOB LEVY,
PHILIP J. SIMON,
Counsel for Respondent.

MILTON G MANASSE,
Of Counsel.

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